

This is the second time this claim is before the Board. The first time was upon respondent's appeal of Judge Foerschler's December 26, 2007, Award. In its May 14, 2008, Order, the Board set aside that Award and remanded this claim to Judge Foerschler to consider Dr. Edward J. Prostic's July 13, 2007, medical report and reconsider claimant's functional impairment after giving that report such weight as it deserved. Upon remand the Judge entered the May 29, 2008, Supplemental Award Modification, which is the subject of this appeal.

In the December 26, 2007, Award, Judge Foerschler adopted the opinions of claimant's medical expert, Dr. P. Brent Koprivica, and awarded claimant permanent disability benefits for a 19 percent right upper extremity impairment and a 28 percent left upper extremity impairment. But in the May 29, 2008, Supplemental Award Modification, the Judge adopted the opinions of Dr. Prostic and awarded claimant permanent disability benefits for a 10 percent right upper extremity impairment and a 15 percent left upper extremity impairment. Furthermore, the disability benefits in the December 26, 2007, Award included 11.14 weeks of temporary total disability benefits for the right upper extremity award and no weeks of temporary total disability benefits for the left upper extremity award. But the disability benefits in the May 29, 2008, Supplemental Award Modification included no weeks of temporary total disability benefits for either upper extremity award.

Claimant argues (1) the Board should not have remanded the December 26, 2007, Award to the Judge; (2) Dr. Prostic did not properly use the *AMA Guides*<sup>1</sup> and, therefore, Judge Foerschler erred in basing the awards upon that doctor's ratings; and (3) claimant's permanent disability benefits should be based upon a 25 percent right upper extremity impairment and a 30 percent left upper extremity impairment, which represent claimant's strength loss.

Respondent contends (1) the Board had the authority to remand this claim to the Judge; (2) Dr. Prostic's opinions comply with the *AMA Guides*; (3) Dr. Koprivica's findings are inconsistent with the objective medical evidence; (4) Dr. Brian J. Divelbiss utilized the *AMA Guides* in assessing claimant's level of impairment; and (5) the greater weight of the evidence supports Judge Foerschler's determination in the May 29, 2008, Supplemental Award Modification of claimant's functional impairment for each upper extremity.

The issues before the Board on this appeal are:

1. Did the Board exceed its jurisdiction in remanding this claim to the Judge to consider Dr. Prostic's opinions regarding claimant's functional impairment?
2. What is the extent of claimant's functional impairment?

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the entire record and considering the parties' arguments, the Board finds and concludes:

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<sup>1</sup> American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

Claimant developed bilateral carpal tunnel syndrome in her wrists and bilateral cubital tunnel syndrome in her elbows while working for respondent. The parties stipulated April 12, 2004, would be the date of accident for these repetitive trauma injuries.

Due to her injuries claimant has undergone two surgeries to her left hand and wrist, one surgery to her right hand and wrist, and one surgery to her left elbow. In August 2004, Dr. John B. Moore performed bilateral endoscopic carpal tunnel release surgeries on claimant's wrists. In January 2005, Dr. Brian J. Divelbiss performed surgery on claimant's left elbow and transposed the ulnar nerve. And in May 2006, Dr. Divelbiss performed another carpal tunnel release surgery on claimant's left wrist. Claimant is contemplating surgery on the right elbow.

Despite her injuries, claimant has returned to her job with respondent where she performs computer keyboarding. Claimant notes she has lost strength in her upper extremities as she is unable to open jars and bottles. She also experiences tingling in both elbows and wrists and now has difficulty playing the piano, cross-stitching, and doing needlepoint.

Because claimant retains the ability to work, claimant's upper extremity injuries are to be compensated under the schedule of K.S.A. 44-510d.<sup>2</sup> And K.S.A. 44-510d(a)(23) provides that the "[l]oss of a scheduled member shall be based upon permanent impairment of function to the scheduled member as determined using the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein."

The record contains three functional impairment opinions. Dr. Divelbiss, a board-certified orthopedic surgeon, rated claimant in early December 2005 as having a 15 percent functional impairment to each upper extremity. But the doctor performed the second left carpal tunnel release surgery on claimant in May 2006, and in January 2007 decreased the right upper extremity rating from 15 percent to 10 percent at the level of the right hand. The doctor did not disturb the 15 percent left upper extremity rating.<sup>3</sup> The doctor explained he reduced the right upper extremity impairment because claimant's right elbow symptoms had decreased.

At his deposition Dr. Divelbiss described how he utilized the AMA *Guides* in rating claimant:

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<sup>2</sup> See *Casco v. Armour Swift-Eckrich*, 283 Kan. 508, 154 P.3d 494, *reh'g denied* (2007).

<sup>3</sup> Divelbiss Depo., Ex. 2.

Q. (Mr. Wimmer) And Doctor, how did you go about rating Ms. Peterson?

A. (Dr. Divelbiss) Well, it's a combination of looking at the AMA guides; looking at what sort of surgeries she had; looking at functional deficits; fitting that into an amount that fits with other ratings for other upper extremities, injuries and problems in the upper extremity.

Q. And in using the AMA guides, did you have a specific page number or chart or graph?

A. I don't have that listed here. Basically at her final visit she was noted to have some discomfort over her incisions and her grip strength was measured. She didn't really have a problem with range of motion in the wrist or at the elbow. Her primary problems were pain, and that if you tapped over her incision she got a little bit of nerve tingling which was the primary reason that she wanted to undergo that second surgery on her hand.<sup>4</sup>

During cross-examination Dr. Divelbiss acknowledged that he did not use either of the two methods set forth in the *AMA Guides* for evaluating entrapment neuropathy: (1) measuring sensory and motor deficits and (2) the alternate method from Table 16, page 57.<sup>5</sup> The doctor testified, in pertinent part:

Q. (Mr. Kolich) Did you use either one of those methods [for evaluating claimant's entrapment neuropathy]?

A. (Dr. Divelbiss) Again, I did not specifically use either one of those methods. It's a matter of after doing this for long enough, getting an idea of what I feel is an appropriate rating for that patient and their residual symptoms, pain, residual numbness and grip strength.

Q. So you kind of use the guides as a reference, but in actuality --

A. I use them as a guide.

Q. In actuality you're relying upon your own experience and training?

A. I do use them as a guide, which is what they're there for.

Q. But you admitted you didn't use either one of these methods to --

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<sup>4</sup> *Id.* at 8, 9.

<sup>5</sup> *Id.* at 14.

A. I didn't specifically go to this chart because I've been doing carpal tunnel and cubital tunnel hundreds of times over the past -- each year. So I have a pretty good idea of what is a reasonable rating and how this fits into the whole scheme of the musculoskeletal section in regards to the upper extremity.<sup>6</sup>

Dr. Divelbiss also testified claimant did not really have entrapment neuropathy in her upper extremities as she had undergone surgery. Moreover, the doctor acknowledged he did not use the *Guides* to assess claimant's impairment from the loss of strength in her hands or arms.

The record also includes the functional impairment ratings provided by claimant's medical expert, Dr. P. Brent Koprivica, who is board-certified in both emergency medicine and occupational medicine. Dr. Koprivica has limited his practice to impairment and disability medical examinations since 1992 and he uses the AMA *Guides* daily.

Dr. Koprivica examined claimant in April 2007 and determined she had developed multiple levels of entrapment neuropathy due to repetitive trauma to her upper extremities. Dr. Koprivica found claimant had a 10 percent upper extremity impairment for each upper extremity for mild cubital tunnel syndrome. He also found claimant had a 10 percent right upper extremity impairment and a 20 percent left upper extremity impairment for her operated carpal tunnel syndrome. The doctor rated the left operated carpal tunnel syndrome higher than the right because claimant had undergone the two left carpal tunnel release surgeries.

Combining the upper extremity ratings, Dr. Koprivica determined claimant had a 19 percent right upper extremity impairment at the elbow and a 28 percent left upper extremity impairment at the elbow.

In analyzing claimant's functional impairment Dr. Koprivica utilized the AMA *Guides* and considered claimant's mild electrodiagnostic findings in both her elbows and wrists. Dr. Koprivica testified the *Guides* does not indicate whether the results from surgery should be considered in determining an individual's upper extremity impairment, but to be consistent with other sections of the *Guides* the electrodiagnostic readings before surgery should be utilized.

Dr. Koprivica also analyzed claimant's impairment considering her relative loss of strength. Based upon claimant's 68 percent loss of strength on the right and her 74 percent loss on the left, the AMA *Guides* yield a 30 percent impairment to each upper

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<sup>6</sup> *Id.* at 14, 15.

extremity. Accordingly, the doctor felt his 19 percent and 28 percent upper extremity ratings were conservative.

Finally, the record includes Dr. Edward J. Prostic's July 13, 2007, medical report, which sets forth the doctor's opinion of claimant's functional impairment. Because Dr. Prostic's opinion was requested by the Judge, the report must be considered. K.S.A. 44-516 provides:

In case of a dispute as to the injury, the director, in the director's discretion, or upon request of either party, may employ one or more neutral health care providers, not exceeding three in number, who shall be of good standing and ability. The health care providers shall make such examinations of the injured employee as the director may direct. **The report of any such health care provider shall be considered by the administrative law judge in making the final determination.** (Emphasis added.)

Dr. Prostic believed claimant had a 10 percent impairment to the right upper extremity and a 15 percent impairment to the left upper extremity. But he further delineated his ratings in a May 20, 2008, letter to the Judge. In that letter, Dr. Prostic indicates claimant has a 10 percent impairment to each upper extremity for injury to the median nerve and an additional 6 percent impairment to the left upper extremity for injury to the ulnar nerve.

**1. Was it appropriate for the Board to remand this claim to the Judge to consider Dr. Prostic's opinions regarding claimant's functional impairment?**

The Workers Compensation Act requires that a worker's functional impairment be determined by using the *AMA Guides*, if the impairment is included in that publication.<sup>7</sup> At the regular hearing claimant objected to Dr. Prostic's medical report because the document did not indicate whether the doctor used the *AMA Guides* in determining claimant's functional impairment despite the Judge having made that a specific request to Dr. Prostic in his order for an independent medical evaluation. At the regular hearing the Judge specifically ruled the report was part of the record.

Dr. Prostic did not testify. And in the December 26, 2007, Award, the Judge failed to list Dr. Prostic's report as part of the evidence and did not mention the report in the Award. In short, respondent and its insurance carrier appealed the December 2007 Award to this Board. And in its May 14, 2008, Order, the Board held that respondent and its insurance carrier had relied upon the Judge's ruling that the medical report was part of the record and, therefore, the Board remanded the claim to the Judge to consider Dr. Prostic's

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<sup>7</sup> See K.S.A. 44-510d and K.S.A. 44-510e.

report in determining claimant's functional impairment and giving the report such weight as it deserved.

Upon receiving the remand, Judge Foerschler wrote Dr. Prostic and requested the doctor to indicate whether he had used the *AMA Guides* in assessing claimant's impairment. The Judge wrote in the letter that he believed the Board wanted to use Dr. Prostic's opinions "as a compromise for the appeal."<sup>8</sup>

Dr. Prostic responded, as follows:

This is a response to your recent request that I rate Miss Peterson according to the *AMA Guides*, 4<sup>th</sup> Edition.

Her ratable elements are residuals of peripheral nerve decompression surgery and weakness of grip. She does not have ratable loss of sensation. My preference is to use Table 16, page 57 for upper extremity impairment due to entrapment neuropathy. From this chart, I would give her 10% for each median nerve and an additional 6% for the left ulnar nerve. These would translate to 6% of the body as a whole for the right upper extremity and 9% of the body as a whole for the left upper extremity which according to the Combined Values Chart on page 322 would be 15% of the body as a whole.

If additional information is required, please notify me.<sup>9</sup>

After receiving Dr. Prostic's letter, the Judge issued the May 29, 2008, Supplemental Award Modification, in which the Judge adopted Dr. Prostic's opinions and held that claimant sustained a 10 percent impairment to her right upper extremity and a 15 percent impairment to her left upper extremity.

Claimant challenges the propriety of the Board remanding this claim to the Judge to consider Dr. Prostic's report. The Board finds that remanding the claim to the Judge to consider Dr. Prostic's report was proper. Contrary to K.S.A. 44-516, the Judge failed to include the report as part of the record. Moreover, the Judge ruled at the regular hearing that the report was part of the evidence and, therefore, respondent and its insurance carrier relied upon that determination. Finally, the Board's authority to remand a claim is found in K.S.A. 2007 Supp. 44-551(i)(1), which provides in part:

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<sup>8</sup> ALJ Letter (May 19, 2008) at 1.

<sup>9</sup> Prostic Letter (May 20, 2008).

On any such review, the board shall have authority to grant or refuse compensation, or to increase or diminish any award of compensation **or to remand any matter to the administrative law judge** for further proceedings. (Emphasis added.)

In summary, the Board rejects claimant's argument that it was improper to remand the claim to the Judge to consider Dr. Prostic's medical report and give it such weight as it might warrant.

## **2. What is the extent of claimant's functional impairment?**

The Board is not persuaded the impairment ratings provided by Dr. Divelbiss were determined by using the AMA *Guides*. And the Board is not persuaded that Dr. Koprivica's opinions are more accurate than those of Dr. Prostic, or vice versa. Consequently, the Board averages the functional impairment ratings provided by Dr. Koprivica and Dr. Prostic and finds:

(a) claimant has sustained a 15 percent impairment ( $20 \text{ percent} + 10 \text{ percent} \div 2$ ) to her left upper extremity at the forearm due to her left carpal tunnel syndrome and injury to the median nerve;

(b) claimant has sustained an 8 percent impairment ( $10 \text{ percent} + 6 \text{ percent} \div 2$ ) to her left upper extremity due to her left cubital tunnel syndrome and injury to the ulnar nerve;

(c) claimant has sustained a 10 percent impairment ( $10 \text{ percent} + 10 \text{ percent} \div 2$ ) to her right upper extremity at the forearm due to her right carpal tunnel syndrome and injury to the median nerve; and

(d) claimant has sustained a 5 percent impairment ( $10 \text{ percent} + 0 \text{ percent} \div 2$ ) to her right upper extremity due to her right cubital tunnel syndrome and injury to the ulnar nerve.

## **AWARD**

**WHEREFORE**, the Board modifies the May 29, 2008, Supplemental Award Modification entered by Judge Foerschler.



**Left Forearm<sup>10</sup>**

Mindy L. Peterson is granted compensation from Systems Material Handling Company and its insurance carrier for an April 12, 2004, accident and resulting disability. Ms. Peterson is entitled to receive 2.71 weeks<sup>11</sup> of temporary total disability benefits at \$440 per week, or \$1,192.40, plus 29.59 weeks of permanent partial disability benefits at \$440 per week, or \$13,019.60, for a 15 percent permanent partial disability to the left forearm, making a total award of \$14,212 for the left carpal tunnel syndrome and median nerve injury, which is all due and owing less any amounts previously paid.

**Left Arm**

Mindy L. Peterson is granted compensation from Systems Material Handling Company and its insurance carrier for an April 12, 2004, accident and resulting disability. Ms. Peterson is entitled to receive 6.57 weeks of temporary total disability benefits at \$440 per week, or \$2,890.80, plus 16.27 weeks of permanent partial disability benefits at \$440 per week, or \$7,158.80, for an 8 percent permanent partial disability to the left arm, making a total award of \$10,049.60 for the left cubital tunnel syndrome and ulnar nerve injury at the elbow, which is all due and owing less any amounts previously paid.

**Right Forearm**

Mindy L. Peterson is granted compensation from Systems Material Handling Company and its insurance carrier for an April 12, 2004, accident and resulting disability. Ms. Peterson is entitled to receive 1 week of temporary total disability benefits at \$440 per week, or \$440, plus 19.90 weeks of permanent partial disability benefits at \$440 per week, or \$8,756, for a 10 percent permanent partial disability to the right forearm, making a total award of \$9,196 for the right carpal tunnel syndrome and median nerve injury, which is all due and owing less any amounts previously paid.

**Right Arm**

Mindy L. Peterson is granted compensation from Systems Material Handling Company and its insurance carrier for an April 12, 2004, accident and resulting disability. Ms. Peterson is entitled to receive 10.50 weeks of permanent partial disability benefits at

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<sup>10</sup> K.A.R. 51-7-8(c)(4) states “[a]n injury at the joint on a scheduled member shall be considered a loss to the next higher schedule.”

<sup>11</sup> The parties filed a written stipulation with the Board on April 4, 2008, in which they agreed the temporary total disability benefits that were paid should be apportioned as follows: 1 week for the right wrist, no weeks for the right elbow, 2.71 weeks for the left wrist, and 6.57 weeks for the left elbow.

\$440 per week, or \$4,620, for a 5 percent permanent partial disability to the right arm, making a total award of \$4,620 for the right cubital tunnel syndrome and ulnar nerve injury at the elbow, which is all due and owing less any amounts previously paid.

The Board adopts the orders regarding requesting future medical treatment, the payment of expenses, and attorney fees as set forth in the December 26, 2007, Award to the extent they are not inconsistent with the above.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of August, 2008.

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BOARD MEMBER

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**DISSENT**

The undersigned respectfully dissents from the majority's decision with regard to the method of calculating the award. The majority's determination that *Casco* applies to this situation is the correct determination. But the majority then calculates each section of the upper extremities separately. This is not contemplated nor required by *Casco*. In *Casco* the Court only considered bilateral shoulder injuries. The injuries did not include separate parts of each upper extremity as is the case here. The majority, in providing ratings for each section of the upper extremities, contradicts the instructions contained in the *AMA Guides* (full cite below). The *AMA Guides* instruct that when considering multiple parts of an extremity, the separate upper extremity impairments are to be determined for each part. Then, the upper extremity impairments are to be combined using the Combined Values Chart on p. 322 of the *AMA Guides*. (*AMA Guides*, sec. 3.1a, p. 3/15; sec. 3.1n, p. 3/65; sec. 3.1o, p. 3/66; sec. 3.1o, p. 3/72). The undersigned would determine the upper

extremity impairments for each separate part as done by the majority, but, then, combine the upper extremity impairments as instructed in the *AMA Guides*.

This specific issue is not one originally raised by the parties in their nature and extent dispute. It is, instead, a dispute raised between the various Board Members at the time of the initial appeal regarding how to properly compute impairments when dealing with multiple body part injuries in the extremities. This dispute will arise each time the Board is asked to consider extremity injuries when the claimant is not found to be permanently and totally disabled and when the claimant has more than one body part injured in one or more extremities. Thus, the issue must be decided not only in this case, but in every such case that arises and is appealed to the Board until such time as the appellate courts decide the issue. Therefore, this Board Member believes the consideration of the *AMA Guides*, as is required by K.S.A. 44-510d(a)(23), is germane to this dispute.

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BOARD MEMBER

c: Mark E. Kolich, Attorney for Claimant  
Andrew D. Wimmer, Attorney for Respondent and its Insurance Carrier  
Marcia Yates-Roberts, Administrative Law Judge